

McDANIEL

∞ LAW FIRM ∞

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March 19, 2007

(Via email and U.S. Mail)

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***Re: Deficiencies in State Agency Privilege Logs-
Rule 37 Communication***

Dear Sirs:

This letter is in reference to the privilege logs provided by the State in response to the following:

1. Peterson Farms' Requests for Production of Documents to the Oklahoma Department of Environmental Quality;
2. Peterson Farms' Requests for Production of Documents to the Oklahoma Water Resources Board;
3. Peterson Farms' Requests for Production of Documents to the Oklahoma Conservation Commission; and
4. Peterson Farms' Requests for Production of Documents to the Oklahoma Scenic River Commission

The State produced these privilege logs to counsel at the time of the Defendants' records review at these agencies. In each instance, the privilege log provided by the State is fatally deficient. Each privilege log contains multiple entries whereby the individuals involved in the communication are not identified with sufficient specificity as to determine whether or not the privileges/protections asserted apply. Moreover, the description of the documents over which the State is claiming privilege are also lacking in sufficient specificity to determine whether the asserted privilege/protection claimed does, in fact, apply. Finally, the State has asserted three privileges/protections for the documents identified on its privilege logs: (1) work product protection under Fed. R. Civ. P. 26 (b)(3); work product protection under Fed. R. Civ. P. 26(b)(4); and (3) attorney-client privilege. As to every entry on the ODEQ, OWRB and the OCC Privilege Logs and as to most of the entries on the OSRC Privilege Log, the State has asserted these three privileges/protections. It is apparent even after reviewing the very limited information provided on these privilege logs that these three privileges/protections cannot apply to every entry to which they are claimed.

March 19, 2007
Page 2 of 5

Beginning with the State's claims of work product, Fed. R. Civ. P. 26(b)(1) states that a party may obtain discovery as to any matter, which is not privileged, and that is relevant to any claim or defense. Fed. R. Civ. P. 26(b)(3) provides protection for documents prepared in anticipation of the pending litigation and as to attorney work product concerning the pending litigation. The documents to which the State has asserted a work product protection appear to be only obtainable from the State and not from any other source. Moreover, most of the documents appear to have been prepared in anticipation of prior litigation, investigations and administrative actions involving the State and not this litigation.

Documents prepared by the State during its normal course of business or pursuant to regulatory requirements are not considered prepared in anticipation of litigation. See *Martin v. Bally's Park Place Hotel & Casino*, 983 F.2d 1252, 1260-61 (3rd Cir. 1993). Furthermore, documents which are not kept as a part of ongoing litigation or investigation by the State are not protected by the attorney-work product doctrine. It is clear under the law that the documents you have claimed as work product, which relate to prior investigations, litigation and administrative actions on these four agencies' privilege logs are not entitled to the protections of Fed. R. Civ. P. 26 (b)(3). Please provide an explanation for how the documents on these privilege logs are work product protected by Fed. R. Civ. P. 26(b)(3) specifically as it applies to prior investigations, litigation or administrative actions which did not involve the Defendants in this matter. If the State cannot provide this explanation, please remove the claim for protection from the privilege log, and immediately produce the document to Peterson.

Additionally, the State has claimed that the majority of the documents identified on the four privilege logs are protected from disclosure pursuant to Fed. R. Civ. P. 26(b)(4). This provision of the Federal Rules prevents a party from seeking "discovery of facts known or opinions held an expert who has been retained or specifically employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial...." In my review of the limited information provided on these privilege logs, I find it difficult to believe that each and every one of the documents identified on these privilege logs is protected as work product by a non-testifying expert in anticipation of this litigation. Please provide an explanation for the assertion of this protection as to each entry for which it is made. If no legally supportable basis can be made as to the non-disclosure of this information, the State must revise its privilege logs to accurately reflect only those protections/privileges the law will support, and provide those documents to Peterson for which no valid protection/privilege applies.

Lastly, the State has claimed that each document on the ODEQ, OCC and OWRB privilege logs and most of the documents on the OSRC privilege log are protected from disclosure under the attorney-client privilege. In attempting to evaluate the applicability of this privilege to the documents on these privilege logs, I have encountered several problems. First, because of the deficiency in the identification of the individual recipients and senders, it is difficult to tell if an attorney has been involved in the creation or receipt of these documents. Second, it is clear from some of the entries and the State's

March 19, 2007

Page 3 of 5

own acknowledgement on the Privilege Logs that no attorney was involved in those communication; thus, I am confused as to how the attorney-client privilege applies to these documents. Finally, the State has failed to identify whether it is asserting attorney-client privilege under Oklahoma law or Federal law. In order to fully evaluate the State's claims for protection under the attorney-client privilege, this information must be provided.

The following examples illustrate the deficiencies regarding the privilege logs from the agencies as discussed above:

1. Item No. 9 on the ODEQ Privilege Log states that a Report prepared by Materials and Chemistry Laboratory, Inc. on March 13, 2003 received by the Attorney General's Office of the State of Oklahoma regarding "a review and evaluation of Sequoyah Fuels Facility Reclamation Plan" is protected from production because it is attorney work product under Fed. R. Civ. P. 26(b)(3)&(4) and attorney-client privileged. I simply cannot fathom the basis for the assertions of these privileges in this case. Was this document prepared in anticipation of this litigation? Is the State claiming that any investigation into any other potential source within the IRW at any time is protected work product or privileged? Has the Materials and Chemistry Laboratory, Inc. been retained in anticipation of this litigation as an expert who is not expected to be called to testify at trial on behalf of the State? Assuming Materials and Chemistry Laboratory, Inc. has been retained as a non-testifying expert in this case, how can a report prepared in March 2003 regarding Sequoyah Fuels be related to this lawsuit which was not filed until June 13, 2005? Furthermore, how does an attorney-client relationship exist with Materials and Chemistry Laboratory, Inc.?
2. Item No. 11 on the OSRC Privilege Log refers to a letter between Brita E. Haugland, Assistant Attorney General and Ed Fite, OSRC Administrator dated December 19, 1989, regarding a "legal analysis relating to potential litigation regarding Lake Frances." How is this document protected by the attorney work product doctrine under Fed. R. Civ. P. 26(b)(3) & (4) and by the attorney client privilege in this case? Again, I am confused as to how the State can justify a claim for work product and attorney-client privilege over a letter from December 1989 in this case. Is the State investigating Lake Frances today? Is there litigation pending against the owner of Lake Frances? Has it been pending since 1989?
3. Item No. 3 on the OCC Privilege Log is identified as a "Draft Phosphorous Control Strategy" from an "unknown" author dated June 15, 1994. The State has asserted that this document is protected from production as work product under both Fed. R. Civ. P. 26(b)(3) and (4) and by the attorney client privilege. How can a legitimate claim be made of privilege and/or work produce when the State is not clear on the identity of the author or the

March 19, 2007

Page 4 of 5

recipient? Moreover, how can a document prepared almost eleven years prior to the filing of this litigation be prepared in anticipation of litigation?

4. Item No. 40 on the OWRB Privilege Log is identified as a Letter re: Proposed Settlement Agreement dated March 30, 1989 between the Oklahoma Attorney General's Office and James R. Barnett. The State has asserted that this document is protected from production as work product under both Fed. R. Civ. P. 26(b)(3) and (4) and by the attorney client privilege. The identification of this document is insufficient under Fed. R. Civ. P. 26 (b)(5) and LCvR 26.4 which require the nature of the document be described in a manner which gives the other party sufficient information as to determine whether or not the privilege/protection claimed applies. The description on this document fails to meet that standard. With whom is the proposed settlement agreement? How is this agreement created in 1989 protected/privileged under Federal or Oklahoma rules?

The State's blanket assertion of these three privileges/protections begs the following questions:

1. Is it the State's position that every time an attorney is conducting business on behalf of a State agency, the information remains privileged/protected indefinitely? If so, please provide the legal basis for the State's ability to maintain such an assertion.
2. Is the State claiming that every communication by a State attorney in the past regarding a prior investigation, litigation or administrative function within the IRW remains privileged/protected communication indefinitely? If this is the State's position, provide the legal basis for such rationale.
3. Is it the State's position that any communication or document which deals with the Illinois River Watershed and the poultry industry regardless of the date or author created it is privileged/protected? Again, if this is the State's position, please provide a legal basis for such rationale.
4. Is it the State's position that any discussion amongst the agencies regarding any agreement between Arkansas and Oklahoma under any consent decree, compact or otherwise is protected/privileged? If so, please provide the rationale basis for such a position when the Defendants were not parties to such actions.

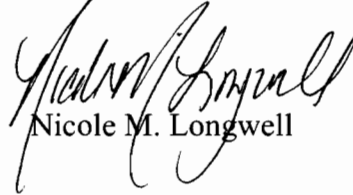
In conclusion, it is Peterson's position that the State simply cannot assert work product or privilege over every document involving any investigation, litigation or administrative action it may have conducted in the past on any potential source of pollution in the IRW without justification under the law. As stated above, the State needs to provide a basis for each of its assertions as to the application of the work product doctrine and attorney-client privilege for each of the entries on the four agencies'

March 19, 2007

Page 5 of 5

Privilege Logs immediately. I request that we arrange a conference pursuant to Fed. R. Civ. P. 37 (a)(2) as soon as possible to address these concerns. I am available on March 21st, 22nd, and 28-30th. Please advise as to which of these dates work for your schedule.

Best regards,

A handwritten signature in black ink, appearing to read "Nicole M. Longwell", written in a cursive style.

Nicole M. Longwell

cc: A. Scott McDaniel
All counsel